

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

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4 KIMBERLY CHIAPPERINI, ET AL.,
PLAINTIFFS

14-CV-6281(L)

5 vs.

6 GANDER MOUNTAIN COMAPNY, INC.,
DAWN NGUYEN, AND THE ESTATE
7 OF WILLIAM SPENGLER,
DEFENDANTS.

Rochester, New York
July 28, 2014
3:45 p.m.

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9 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
10 UNITED STATES DISTRICT JUDGE

11 JONATHAN E. LOWY, ESQ.
1225 Eye Street NW, Suite 1100
12 Washington, DC 20005

- and -

13 ARNOLD & PORTER
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- and -

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P R O C E E D I N G S

* * *

THE COURT: All right. Good afternoon, all.

MR. LOWY: Good afternoon.

MR. STAPLETON: Good afternoon.

THE COURT: We are here on the plaintiffs' motion to remand this case to state court, motion brought by defendant Gander Mountain Company.

Why don't we have appearances for plaintiff?

Mr. O'Brien?

MR. SCHISSEL: For the plaintiffs, Mike Schissel from Arnold & Porter, and also with me is Eric Lee. My last name is spelled S-C-H-I-S-S as in Sam, E-L. Schissel.

THE COURT: Schissel?

MR. SCHISSEL: Schissel.

THE COURT: I'm sorry, Schissel.

MR. SCHISSEL: One of my colleagues from Arnold & Porter, Eric Lee, is also with me.

THE COURT: Okay. Who will be carrying the rowing oar here in terms of argument?

MR. SCHISSEL: I will be, Your Honor.

THE COURT: Okay. It's nice to see Mr. O'Brien here.

MR. O'BRIEN: Yes, Your Honor, for the plaintiffs.

THE COURT: Okay. Appearing for Gander Mountain?

1 **MR. STAPLETON:** For defendant Gander Mountain, Brian
2 T. Stapleton, S-T-A-P-L-E-T-O-N, trial counsel from Goldberg
3 Segalla. My office is located at 11 Martine Avenue in White
4 Plains, New York 10606. Good afternoon, Your Honor.

03:49:08PM 5 **THE COURT:** Good afternoon. Perhaps Mr. Schissel
6 and Mr. Stapleton could join me up here at the lecterns and
7 we'll see what we can do here.

8 You can explain to me what this is all about.
9 Actually, I think I know exactly what it's all about.

03:49:33PM 10 I guess, Mr. Stapleton, first off, since I know
11 you're admitted to this court, I don't think you received
12 leave to file a brief exceeding our local rule, a 25 page
13 requirement. Do you wish to make that application now?

14 **MR. STAPLETON:** Your Honor, I apologize for not
03:49:52PM 15 doing so and yes, I do wish to ask the Court to accept our
16 oversize briefing.

17 **THE COURT:** All right, we'll grant that.

18 **MR. STAPLETON:** Thank you, Your Honor.

19 **THE COURT:** Try to, I guess, Mr. Stapleton, I will
03:50:08PM 20 start with you first. What legal authority, either in the
21 statute or by case law, do you have that this kind of action,
22 which implicates, I don't know if you pronounce the acronym
23 PLCAA or the Protection of Lawful Commerce and Arms Act.

24 Is PLCAA an acceptable acronym?

03:50:36PM 25 **MR. STAPLETON:** I honestly don't know, Your Honor.

1 **THE COURT:** I don't either.

2 **MR. SCHISSEL:** That's the way we refer to it, Your
3 Honor.

4 **MR. STAPLETON:** I just say PLCAA.

03:50:44PM 5 **THE COURT:** I like PLCAA.

6 **MR. STAPLETON:** PLCAA.

7 **THE COURT:** What legal authority do you have that
8 PLCAA, the statute passed back in 2005, I think, preempts this
9 court from having jurisdiction over the matter? Start with
03:51:02PM 10 the statute. Is there anything in the statute that says that?

11 **MR. STAPLETON:** That says this court -- that
12 preempts this court from having jurisdiction?

13 **THE COURT:** Yeah.

14 **MR. STAPLETON:** There is nothing in the statute by
03:51:11PM 15 its terms that preempts this court from exercising
16 jurisdiction, if I understood Your Honor correctly.

17 **THE COURT:** Isn't that part of your argument here
18 that, I'm sorry, I misspoke. State court.

19 **MR. STAPLETON:** State court.

03:51:24PM 20 **THE COURT:** I'm sorry, state court. What in the
21 statute preempts New York state court from entertaining the
22 action?

23 **MR. STAPLETON:** Well, because the statute under
24 7902, Your Honor, precludes the commencement of a qualified
03:51:41PM 25 civil liability action in any court, anywhere, and that would

1 include federal court or state court.

2 **THE COURT:** Well, but I think you would agree that
3 the statute doesn't, unlike some other statutes that Congress
4 has passed which very specifically say, for instance, I think
03:52:01PM 5 ERISA might be one, that federal law and federal court
6 preempts any action in state court. This to me does not seem
7 to be that kind of statute.

8 Since it, as you know, by its very terms it refers
9 to the fact that any action brought in state or federal court,
03:52:21PM 10 if it's a qualified action, is barred or precluded.

11 So I -- I don't think the statute automatically
12 precludes state court from handling this under the preemption
13 doctrine. If you have case law that suggests that or says
14 that, we haven't found any.

03:52:41PM 15 **MR. STAPLETON:** I do not have case law which says
16 that the -- that PLCAA automatically precludes a state court
17 from adjudicating the action. And there are more than one
18 example in which a state court has interpreted PLCAA to have a
19 preclusive effect. That is not the heart of our argument,
03:53:03PM 20 Your Honor.

21 **THE COURT:** I thought it was. I thought the gist of
22 the argument was that the -- you also raise federal question
23 jurisdiction and suggestion that the state courts might be
24 biased in some way.

03:53:15PM 25 But I thought the gist of your argument was that

1 there is a preemption argument here that makes this case
2 amenable to or properly prosecuted in federal court, not state
3 court. I don't think the statute supports that.

4 **MR. STAPLETON:** Well, Your Honor, we are -- our
03:53:38PM 5 argument is that PLCAA completely eviscerates the common law
6 and prohibits the commencement of a qualified legal -- a
7 qualified civil liability action in any jurisdiction.

8 The complement to that argument is that this is
9 inherently a federal question and, therefore, removal is
03:54:01PM 10 proper to this court.

11 **THE COURT:** What does that mean, it's inherently a
12 federal question? I don't know what that means.

13 **MR. STAPLETON:** Well, we believe that because --
14 because PLCAA has a preemptive effect and we don't -- to be
03:54:13PM 15 clear, we are not claiming that PLCAA is completely preemptive
16 in the way that ERISA is or -- and NLRB matters are.

17 But they -- but PLCAA completely preempts a
18 specified subset of actions brought against qualified sellers
19 of qualified products.

03:54:34PM 20 That is not in favor -- that is not in favor, Your
21 Honor, of federal court over state court, but it is -- it is
22 in any jurisdiction period, end of story.

23 The issue of whether or not --

24 **THE COURT:** That's a big concession, though. I
03:54:49PM 25 think what you're saying is some judge is going to have to

1 decide whether this particular lawsuit is barred by PLCAA, to
2 use your acronym, and you suggest it should be me, and the
3 plaintiffs suggest, no, there's no reason why a state judge
4 can't make the same kind of analysis.

03:55:06PM 5 **MR. STAPLETON:** Your Honor, the issue -- the issue
6 of whether the removal -- the only issue we're here today to
7 decide is whether removal to this court was proper.

8 **THE COURT:** I agree.

9 **MR. STAPLETON:** And removal to this court was proper
03:55:19PM 10 because of PLCAA's preemptive effect and the fact that none of
11 the plaintiffs' claims stand or fall independently of PLCAA.

12 Every single one of plaintiffs' causes of action
13 must be analyzed through the prism of PLCAA before it can be
14 said to go forward, and that is a federal question.

03:55:42PM 15 The --

16 **THE COURT:** That's easy to say, but I think the
17 plaintiffs would suggest that it's not necessarily so. They
18 are garden variety state claims and, admittedly, there are
19 some hurdles that PLCAA imposes.

03:55:58PM 20 But the second question I wanted to ask you, and I
21 think you've already answered it, you admit that PLCAA does
22 not bar all actions against firearms manufacturers and
23 dealers.

24 I think you have to agree that the statute says
03:56:13PM 25 there are certain actions that are not barred by PLCAA. Some

1 have to do with product liability, which are not, you know,
2 defects in the product, which we're not talking about, but
3 there seem to me to be other sections under the statute --
4 well, you know what they are, Section 5 of the statute, 79 --

03:56:39PM

5 **MR. STAPLETON:** 7905(a).

6 **THE COURT:** 7903(5), they list several exceptions.
7 Negligent entrustment or negligence per se, the seller
8 knowingly violated a state or federal statute, and that that
9 violation was the proximate cause.

03:56:56PM

10 It seems to me you have to concede that not every
11 action involving a firearm bought from a manufacturer or
12 seller is barred by PLCAA.

13 Can we at least agree on that.

14 **MR. STAPLETON:** Judge, we can't.

03:57:09PM

15 And I will even go further and say that had this
16 complaint been drafted to only contain counts for negligent
17 entrustment or negligence per se, we wouldn't be standing
18 here.

03:57:22PM

19 Those actions, if well pleaded, fall within the
20 narrowly defined exceptions to PLCAA. However, that's not the
21 case here. There are -- the majority of the plaintiffs'
22 causes of action are expressly prohibited by the statute in
23 that there are -- in that the language of the statute is very,
24 very clear.

03:57:38PM

25 For example, Your Honor, we discuss in our brief

1 the issue, the claim of negligent training and supervision for
2 which the plaintiffs have not alleged any predicate statutes,
3 for which there is no common law basis and which are expressly
4 prohibited per the intent of the people who wrote the statute.

03:58:00PM 5 Their corollary request for relief, which is an
6 injunction tagged on to and relating to the negligent training
7 and supervision, is a clearly prohibited qualified civil
8 liability action.

9 Now, the same could be said, Your Honor, for
03:58:16PM 10 Count 7, which is public nuisance.

11 Counts 8 -- actually, the remainder of the counts,
12 Counts 7 through 12, which are public nuisance, loss of
13 consortium, wrongful death and survival.

14 Congress enacted a series of very narrowly tailored
03:58:30PM 15 exceptions to the prohibitive effect of a statute. Had they
16 wished to allow a public nuisance claim or a wrongful death
17 claim or loss of consortium claim go forward, they could and
18 would have done so. They did not.

19 **THE COURT:** Let me just -- before it gets too far
03:58:47PM 20 away and I forget my question --

21 **MR. STAPLETON:** Sure.

22 **THE COURT:** -- I thought that in the reply to your
23 motion, that the plaintiffs suggested that in some way you
24 recognized that some claims brought by the plaintiff might
03:59:05PM 25 come within the ambit of the exceptions of Section 7903(5)

1 because I thought, Mr. Schissel -- am I saying that right?

2 **MR. SCHISSEL:** That's correct, Your Honor.

3 **THE COURT:** That in your papers you suggested that
4 the motion to dismiss that was filed relatively close to the
03:59:24PM 5 motion to remand only challenged certain of the causes of the
6 complaint.

7 Am I accurate or --

8 **MR. SCHISSEL:** That's absolutely correct, Your
9 Honor. It only challenged two of our 12 counts.

03:59:37PM 10 **THE COURT:** So I guess, Mr. Stapleton, doesn't that
11 suggest that by dint of your motion, that you recognize there
12 are some claims against manufacturers and dealers that might
13 come within the ambit of 7903(5)?

14 Well, I guess that's my question.

04:00:03PM 15 **MR. STAPLETON:** And the answer is respectfully, Your
16 Honor, no, for two reasons. One, the prohibitive operative
17 language of the statute is 7902, which is very simple, it's a
18 single sentence: Qualified civil liability actions are
19 prohibited.

04:00:19PM 20 Relying on the fact that we made a motion under
21 12(b)(6), which was made not coincidentally, Your Honor,
22 before Dawn Nguyen pleaded guilty before you to a specific
23 federal statute in which she admitted that she lied with the
24 intent to deceive Gander Mountain is of no moment and no
04:00:41PM 25 bearing on this motion for remand.

1 A 12(b)(6) motion, as you know, Your Honor, has a
2 very, very different and lower standard than a Rule 56 motion.

3 And that motion, our 12(b)(6) motion was filed with
4 knowledge and respect of the low threshold pleading standards
04:01:01PM 5 and made before Ms. Nguyen pleaded guilty to lying with the
6 intent to deceive Gander Mountain before you.

7 **THE COURT:** I don't know what her pleading has to do
8 with this.

9 **MR. STAPLETON:** Your Honor, I bring it up because it
04:01:15PM 10 speaks to the arrows we had in our quiver at the time we made
11 the motion and are without -- without respect to what the
12 PLCAA had to say, but more with respect to the facts that we
13 had or did not have at the time we made our motion.

14 **THE COURT:** Well, let me ask you about something
04:01:36PM 15 that I think you concede in your papers, that generally in
16 removal situations, the fact there might be a federal defense
17 to a lawsuit is generally, in my view, universally the rule
18 that that does not state a valid reason for removal.

19 The plaintiff has some right to choose the nature
04:01:57PM 20 of his or her or its complaint and the forum, and the fact
21 that there might be a defense under federal law does not
22 constitute, in my view, a federal question or give you the
23 basis to remove the case.

24 And I think the plaintiffs have suggested that's
04:02:15PM 25 really what you did in your initial motion to remove, that you

1 suggested there were some federal issues under the statute,
2 and, therefore, you should leap frog from state court to
3 federal court.

04:02:36PM 4 This PLCAA statute seems to me to be a shield to
5 certain actions, not all, but certain actions which should be
6 raised in the proper forum and the proper place at the proper
7 time.

8 I mean, isn't this just like any other defense
9 that's raised in an action that generally does not allow, does
04:02:53PM 10 not warrant, does not justify removal just based on the fact
11 there's a federal, possible federal defense?

12 **MR. STAPLETON:** No, categorically no, categorically
13 no. The characterization --

14 **THE COURT:** Tell me why.

04:03:08PM 15 **MR. STAPLETON:** -- the characterization --

16 **THE COURT:** I get your answer is no, but tell me
17 why. That was pretty clear.

18 Did you get that down, Ms. Macri?

19 **THE REPORTER:** I did.

04:03:16PM 20 **MR. STAPLETON:** Your Honor, the characterization of
21 PLCAA as an affirmative defense is a gross misrepresentation
22 of its statutory purpose. PLCAA is not an affirmative
23 defense. PLCAA is not a shield. It is a sword.

24 The issue of preemption --

04:03:28PM 25 **THE COURT:** How can it be a sword if it bars certain

1 actions? It says you can't bring certain actions, they call
2 them qualified actions. They list certain exceptions,
3 exemptions. But -- well, all right. I'll hear your argument.
4 I think Mr. Schissel might differ somewhat.

04:03:48PM

5 **MR. STAPLETON:** I'm sure my colleague across the
6 aisle does differ with me, but the issue of preemption is not
7 an affirmative defense reserved for trial. The language of
8 the statute is very clear. The language of the statute says
9 qualified civil liability actions are entitled to immediate
10 dismissal.

04:04:04PM

11 The Federal Rules of Civil Procedure allow for a
12 motion --

13 **THE COURT:** In either state or federal court.

14 **MR. STAPLETON:** Your Honor, it doesn't say -- Your
15 Honor, it does not say only in federal court. But the issue
16 of preemption, Judge, the issue of preemption is inherently a
17 federal question.

04:04:12PM

18 Preemption is not an affirmative defense, but a
19 challenge to a court's jurisdiction.

04:04:27PM

20 **THE COURT:** Well, if Congress wanted us to focus on
21 preemption, if Congress wanted to take this out of the state
22 courts into federal court, don't you think they have the
23 wherewithal and the knowledge as to how to do that?

24 They are capable of doing some things and I think
25 this would be one that they could say, you know, the federal

04:04:41PM

1 interest is so great that only litigation in federal court is
2 warranted, and they certainly didn't say that.

3 And I don't think the legislative history supports
4 that. You know, you can read the statute, it's not very long.
04:04:56PM 5 But it certainly doesn't say -- in fact, it specifically says
6 that you can't use any part of the statute as sort of a
7 lynchpin to create a cause of action.

8 So if it's not a defense and a shield, I mean, it
9 protects defendants from being sued in certain kinds of
04:05:13PM 10 actions. If that's not a defense, I don't know what is.

11 **MR. STAPLETON:** Well, Your Honor, the assessment of
12 the preemptive effect of congressional enactment termination,
13 of congressional intent and the boundaries and character of a
14 preemptive congressional enactment is a question of federal
04:05:29PM 15 law.

16 It's an antecedent federal question. And the
17 simple fact that the congressional enactment of prohibiting
18 qualified civil liability claims in any jurisdiction certainly
19 does not defeat the defendants' right to have the scope and
04:05:48PM 20 extent of a federal statute prohibiting a subset of qualified
21 actions against a qualified seller, it doesn't invalidate our
22 basis for removal.

23 **THE COURT:** Let me hear from, before we get too far
24 afield, I don't want Mr. Schissel to think we've forgotten
04:06:09PM 25 about him.

1 What say you to my comment that I view this PLCAA
2 statute, if you will, as creating a defense to certain actions
3 brought against manufacturers and dealers?

4 Mr. Stapleton said no, no, no way. No bloody way I
04:06:34PM 5 think he said.

6 **MR. SCHISSEL:** He said categorically no,
7 categorically no. I believe that's what he said.

8 **THE COURT:** All right. So why -- am I missing
9 something?

04:06:43PM 10 **MR. SCHISSEL:** Your Honor, I think you're right on
11 and it's not just me saying it. The Courts have said it. Let
12 me just back up and get to PLCAA as a defense.

13 Counsel's lead argument, as I understand it,
14 they've abandoned the arguments they made in their original
04:07:00PM 15 notice of removal and they're relying on complete preemption
16 doctrine, which they go through extensively starting at page
17 13 of their brief.

18 What the case law says, the Supreme Court and a
19 Western District of New York case that we cited, 2010 *In Re:*
04:07:16PM 20 *Air Crash*, to have complete -- complete preemption, complete
21 federal preemption over state law claims, the federal statute
22 has to, quote, substitute a federal remedy for that law.

23 The PLCAA statute expressly says --

24 **THE COURT:** Like ERISA?

04:07:36PM 25 **MR. SCHISSEL:** Like ERISA. The PLCAA statute -- we

1 cite this in our brief, it says explicitly it is not creating
2 a federal remedy of law.

3 It says -- 15, U.S.C., 7903(5)(C) says, quote, no
4 provision of this chapter shall be construed to create a
04:07:54PM 5 public or private cause of action or remedy.

6 So all it is, Your Honor, is it is a defense. What
7 it says is -- and what counsel is doing, respectfully, is he's
8 conflating his merits argument that our claims are barred by
9 PLCAA with the matter of subject matter jurisdiction, which is
04:08:17PM 10 what we're here today to discuss.

11 **THE COURT:** I mean, at some point in time they may
12 be deemed to be barred.

13 **MR. SCHISSEL:** They may be. If we lose, they may be
14 barred. But for purposes of today, the Second Circuit says in
04:08:33PM 15 the *City of New York vs. Mickalis Pawn Shop* case,
16 Second Circuit 2011, it was a PLCAA case and it says, quote,
17 PLCAA simply does not speak in jurisdictional terms or refer
18 in any way to the jurisdiction of the district courts.

19 It is not a jurisdictional statute, Your Honor.

04:08:56PM 20 And all it does is create a defense for certain
21 types of lawsuits, but also allows certain types of claims to
22 proceed, claims that we've alleged in our complaint.

23 Now, counsel says preemption is a matter of federal
24 jurisdiction that Your Honor needs to decide, that the state
04:09:15PM 25 court cannot decide it.

1 But they cite in their brief a case called
2 *Franchise Tax Board*, which is a U.S. Supreme Court from 1983
3 that says even when the defense is federal preemption, that
4 does not create federal jurisdiction.

04:09:30PM 5 That's an issue that state court can decide if
6 there's no other -- no other grounds for federal jurisdiction.

7 In this case there is no diversity. There is no
8 federal question. All they have and all they're asserting is
9 PLCAA, a federal statute, as a defense to our common law tort
04:09:48PM 10 claims, negligence, wrongful death, et cetera.

11 And so I think, Your Honor, it's probably a long
12 way of answering your question, but I think you have it
13 exactly right not just because I think so, but because the
14 cases say so.

04:10:00PM 15 There was a case just like this, Your Honor, we
16 cite in our brief, the only one we could ever find where the
17 gun industry actually asserts this preemption type argument in
18 a PLCAA case and that was out in the District of Montana, the
19 *Woods* case. And there the judge said it's not a
04:10:14PM 20 jurisdictional statute. A negligence claim that alleges
21 federal violations is still a state law negligence claim.

22 **THE COURT:** The *Woods* case, noted senior judge,
23 discussed many of the same issues that we have here and a
24 thoughtful opinion.

04:10:35PM 25 **MR. SCHISSEL:** Your Honor, I also wanted to make one

1 procedural argument that Your Honor has not asked about.

2 In their notice of removal, they made two very
3 specific arguments. They said PLCAA is a defense, a federal
4 defense. And they said we've alleged violations of federal
04:10:52PM 5 law in our case was the standard for negligence.

6 In the opposition to our petition, motion to
7 remand, they make these three new arguments, complete
8 preemption, the interstate commerce argument and the argument
9 that state courts can't be fair to them.

04:11:15PM 10 Those were not pled in the notice of removal and
11 the 30 days to assert grounds for removal have long passed.

12 There are cases and, Your Honor, we cited one
13 case -- we found three other cases in the Second Circuit, one
14 Second Circuit case and two district court cases.

04:11:33PM 15 I'm prepared to hand them up to Your Honor or give
16 you the cites that say you can't amend your notice of removal
17 in the context of a motion for remand.

18 There was one case, and I can give you the cites
19 for them, where the defendant removed saying that -- that the
04:11:51PM 20 diversity grounds, saying that the amount in controversy
21 exceeded \$50,000, even though the jurisdictional limit is
22 \$75,000. And the Court denied the application to amend
23 because it was too late, and the Court deemed that
24 substantive.

04:12:06PM 25 I think now trying to effectively amend by adding

1 these three federal preemption and constitutional and fairness
2 arguments is even more substantive than an error like that,
3 Your Honor, so I think it's too late to make these arguments.

4 **THE COURT:** Mr. Stapleton, what say you about that?

04:12:23PM 5 There is a lot of law that talks about when you make your
6 application to remove, that you can't add subsequent arguments
7 after the 30-day period.

8 **MR. STAPLETON:** Well, Your Honor, I begin with the
9 recognition that Mr. Schissel is mischaracterizing our notice
04:12:40PM 10 of removal.

11 The words "affirmative defense" don't appear in
12 that notice of removal and I would challenge Mr. Schissel to
13 show me where they do. So they don't appear there, Your
14 Honor.

04:12:50PM 15 **THE COURT:** I read the notice of removal today, and
16 I also read your more recent papers which are certainly much
17 more expansive and develop arguments that I don't think you
18 can glean from the four corners of the notice of removal.

19 **MR. STAPLETON:** Your Honor, the notice of removal
04:13:06PM 20 speaks of the preclusive effect of the Protection of Lawful
21 Commerce and Arm Acts -- Protection of Lawful Commerce and
22 Arms Act.

23 It does never and it does not describe PLCAA as an
24 affirmative defense. It says that the -- that the plaintiffs'
04:13:24PM 25 claims are precluded by PLCAA. That's the language that's in

1 there.

2 Mr. Schissel cites to a case that was decided in
3 1983, more than 15 years before PLCAA was decided. So that's
4 certainly not a case that's on all fours with the issues here.

04:13:43PM 5 The arguments that we make in response to the
6 plaintiffs' motion are fair and invited arguments and don't
7 amount to an amendment of our notice of removal in any way.

8 We discuss the -- we discuss the preclusive effect
9 of PLCAA briefly in our notice of removal, the purpose of the
04:14:08PM 10 notice is not to be a brief on -- in opposition to a motion
11 for remand.

12 But we are not in any way attempting to amend our
13 notice of removal and I don't think our reply brief amounts to
14 the same.

04:14:24PM 15 The --

16 **THE COURT:** Let me turn to another issue just --
17 leaving aside the preemption argument for a minute, which I
18 understand you are advancing vigorously.

19 Aside from that, and I know that's a big aside, but
04:14:47PM 20 do you agree that state judges routinely or at least not
21 infrequently have to rule on federal statutory issues?

22 I mean, not to mention constitutional issues, First
23 Amendment issues, Fourth Amendment issues, discrimination
24 statute s, tax statutes. There are many instances where state
04:15:12PM 25 judges have to deal with federal law, which doesn't seem to me

1 a unique circumstance.

2 Why, leaving aside preemption, why couldn't a state
3 judge here decide the issues that you think should be decided
4 here? They do it all the time in terms of federal law, state
04:15:33PM 5 law, constitutional law.

6 **MR. STAPLETON:** Your Honor, to be certain, state
7 courts do decide issues of federal law in state proceedings.
8 1983 actions, for example, can proceed in state court.

9 But what the plaintiffs are doing here by trying to
04:15:54PM 10 claim that the federal -- the federal laws they cite as
11 clearly predicate statutes and what is -- amounts to an
12 unabashed exercise in artful pleading, is not the equivalent
13 of asking a state court to decide a federal issue.

14 That is a pleading that's designed to avoid a
04:16:16PM 15 preemptive effect of a federal statute, which is the proper
16 business of a federal court to decide.

17 My friend has cited and has said, I believe, in his
18 articulation of his argument that precedes mine, that these
19 are common law state claims, that they are merely citing
04:16:37PM 20 federal statutes to somehow inform or establish a duty on
21 behalf of Gander to the plaintiffs.

22 That is nonsense. The federal statute cited by the
23 plaintiffs are cited for the sole purpose of avoiding the
24 preemptive effect of the PLCAA statute.

04:16:54PM 25 The statutes they cite have no impact or relation

1 to any duty of care that can be imposed under a common law
2 negligence theory on Gander Mountain and a simple examination
3 of those statutes reveals that.

4 The statutes they cite, the first two, 18, U.S.C.,
04:17:14PM 5 Section 23 and Section 371 defined the term principal and
6 conspiracy charges under federal criminal law.

7 The second statute simply defines the federal crime
8 of conspiracy.

9 This is not a conspiracy case. This is an
04:17:30PM 10 allegation of negligence. The definition of principal as it
11 relates to the crime of conspiracy under the Federal Criminal
12 Code has no impact or relation to any duty imposed on it by
13 Gander.

14 18, U.S.C., 922(a) simply says that an individual
04:17:47PM 15 can't sell a firearm without a license. There's no issue here
16 that Gander holds an FFL.

17 So that statute has nothing to do with the
18 imposition or creation of a duty or somehow supports a
19 negligence per se claim.

04:18:02PM 20 The fourth statute they cite, 922(a)(6), is the one
21 I believe that Dawn Nguyen pleaded guilty to in front of you,
22 which says that a buyer of a firearm cannot knowingly falsify
23 a firearm related record with the intent to deceive a seller.

24 Now, how on earth that could conceivably apply to a
04:18:24PM 25 duty that Gander Mountain owed to the estate of Mr.

1 Chiapperini or Mr. Kaczowka is quite simply beyond me.

2 **THE COURT:** Let's not get into merits here. That
3 will be for another day either here or up the street.

4 Your brief makes a very strong statement
04:18:48PM 5 about state courts, which I don't think I've seen very often
6 in briefs. That this court should exercise jurisdiction
7 because New York state courts have already shown a bias toward
8 local citizens in the context of PLCAA, and that an elected
9 judge is at a risk of misapplying federal law.

04:19:16PM 10 I mean, that's a pretty strong, disparaging
11 statement of my brother and sister judges in state court, that
12 somehow, leaving aside the plaintiffs' arguments, that the
13 *Williams* court didn't really do that.

14 But, I mean, that's -- plaintiffs suggest, you
04:19:36PM 15 know, if this is not court shopping or judge shopping, we
16 don't know what is.

17 I don't think they said "we don't know what is,"
18 but, I mean, that's a pretty strong statement to -- I don't
19 say slander the state courts, but you're impugning the whole
04:19:50PM 20 New York state judiciary that they can't be fair because it's
21 a publicized case, which happens pretty much every week around
22 here.

23 **MR. STAPLETON:** Judge, I think it's -- I think -- I
24 think it's -- well, first of all, we stand by the comments we
04:20:02PM 25 made regarding the particular decision in *Woods vs. Miller*.

1 Needless to say, it was not on my Christmas list.

2 **THE COURT:** I said *Williams*, I'm sorry, I
3 correctly --

4 **MR. SCHISSEL:** It's *Williams*, Your Honor.

04:20:14PM 5 **MR. STAPLETON:** That's correct. So --

6 **THE COURT:** I was right?

7 **MR. SCHISSEL:** You were right.

8 **THE COURT:** Always happy when that happens. I'm
9 sorry for interrupting.

04:20:21PM 10 **MR. STAPLETON:** That's okay. We certainly are not
11 seeking to avoid any effect of *Williams*. We think *Williams*
12 stands out as a shining example of how a state court
13 completely implodes the obvious purpose of the PLCAA, and that
14 is to preclude qualified access from going forward.

04:20:40PM 15 What we see in *Williams* is the wholesale subversion
16 of a federal preemptive statute to a local Rule of Civil
17 Procedure with no regard to congressional intent in enacting
18 the federal statute.

19 Now --

04:20:55PM 20 **THE COURT:** That still sounds like you just think
21 the state courts are going to be completely biased and
22 unwilling to accept arguments that you think they should, and
23 that's troubling to me.

24 **MR. STAPLETON:** Your Honor, I recognize that that is
04:21:06PM 25 a -- that is a strong statement. It's also impossible to

1 ignore what this particular case is about.

2 It's impossible. This is -- this is -- this is --
3 this is a horrible tragedy that has had a dramatic impact on
4 this community. I don't think, should this case ever get to a
04:21:29PM 5 jury selection phase, which I doubt that it will, but should
6 it ever get that far, that we're going to find a juror that
7 hasn't heard of this, hasn't been affected by it, hasn't been
8 impacted and knew someone who knows the Chiapperini's or the
9 Kaczowka's or the Hofstetter's or any of the plaintiffs.

04:21:46PM 10 That's a simple reality. The fact is state court
11 judges are elected officials.

12 **THE COURT:** We get our same jury pool in federal
13 court that they do in state court.

14 **MR. STAPLETON:** Yes, Your Honor.

04:21:56PM 15 But -- but -- but Your Honor is not put that the
16 the bench in the same process and subject to the same
17 political influences that state court judges are.

18 **THE COURT:** Well, now I get back to my -- I mean,
19 that doesn't give very much honor to the integrity of the
04:22:17PM 20 those judges who do have to make tough decisions and yes, face
21 election. And I often comment that it can be difficult in
22 that sort of a system, although the elections there are spaced
23 out over 14 years or 10 years, which is a long time.

24 But I just -- I mean, I read your brief and the
04:22:39PM 25 plaintiffs suggest it's tantamount to judge shopping, although

1 I'm not sure why federal courts wouldn't be moved by the
2 tragedy as well.

3 We're all human, but I think we all take an oath to
4 uphold the law and we all try to do it as best we can.

04:22:56PM 5 **MR. STAPLETON:** And, Judge, I have no doubt of that.
6 And I think the same argument could be leveled at the
7 plaintiffs with equal force and effect.

8 The plaintiffs have artfully pleaded a complaint
9 that's designed to, number one, maximize damages by placing it
04:23:10PM 10 in the state forum and avoid a preclusive effect of a federal
11 law. If there's anybody who is forum shopping here, it's the
12 plaintiffs.

13 There is --

14 **THE COURT:** On the other hand, plaintiffs are the
04:23:20PM 15 masters of their complaint. They choose the complaint, they
16 choose the forum.

17 **MR. STAPLETON:** That's true.

18 **THE COURT:** Defendants don't.

19 **MR. STAPLETON:** Judge, that's true. The plaintiffs
04:23:28PM 20 are the masters of the complaint. They're allowed and
21 entitled to draft a well-pleaded complaint, and my respected
22 opponents have drafted a very fine complaint.

23 However, they are not allowed to artfully plead in
24 order to avoid removal or the preemptive effect of a federal
04:23:44PM 25 statute, and that's exactly what they've done here.

1 Judge, perhaps a more palatable argument regarding
2 or relating to the issue of state court bias, which is really
3 the fourth prong of the *Gunn* test.

4 **THE COURT:** Of the what?

04:24:05PM 5 **MR. STAPLETON:** The *Gunn* test. The four prong
6 federal question standard established by the Supreme Court in
7 the case of *Gunn*, which we cite in our brief very briefly, the
8 standards, the four prongs are in order to find the federal
9 question exists and that removal is proper under federal
04:24:25PM 10 question, there has to be a federal -- an issue that is
11 necessarily raised, which the plaintiffs' complaint
12 necessarily does.

13 It has to be disputed, and obviously we are in
14 dispute about this.

04:24:36PM 15 We claim that PLCAA has a preemptive effect on the
16 complaint. Plaintiffs, I am sure, say it does not.

17 The issue has to be substantial, and in the *City of*
18 *New York vs. Beretta* the Second Circuit has already found
19 substantiality in this issue relating to interstate commerce.

04:24:53PM 20 The recognition that prohibited lawsuits
21 substantially burden an industry, which is by its nature
22 interstate, if not international.

23 And then the fourth prong is that removal has to be
24 effectuated such that it doesn't disrupt the congressionally
04:25:10PM 25 approved division of labor between federal and state courts.

1 That comment, that argument regarding bias, was made with
2 respect to the fourth prong of the *Gunn* test.

3 Your Honor, I would submit to you that there are
4 equally persuasive reasons why that fourth prong is satisfied.

04:25:34PM 5 Clearly, PLCAA does not violate separation of
6 powers, does not violate the Tenth or the First Amendment. It
7 does not intrude upon true local matters.

8 And Your Honor had asked me what is, in sum and
9 substance, you know, can the state court decide federal
04:25:52PM 10 issues? And the answer is yes. With the same frequency,
11 perhaps less than federal courts are called upon to decide
12 federal issues that arise out of state law claims.

13 What is equally important is that allowing this
14 case to remain here in this court would not disrupt the
04:26:12PM 15 balance of division of labor, it wouldn't open the flood gates
16 of litigation.

17 And while these cases, these shooting cases, are of
18 legitimate public concern, and there have been a number of
19 them in recent years, there's no disputing the fact that these
04:26:37PM 20 are rare occurrences, that shootings with semi-automatic
21 firearms historically over decades account for less than 1% of
22 gun crimes across the country year in and year out.

23 There's no -- there's no -- there's no question
24 that allowing this case here, to remain here would somehow
04:26:57PM 25 disrupt the division of labor between the state and federal

1 courts.

2 And I say that, Your Honor, understanding that it
3 is a tough sell to ask you to recognize that there may be a
4 potential state court bias.

04:27:14PM 5 So I thank you for hearing me on that issue today.

6 **THE COURT:** Appreciate that. Well, I think we've
7 had a good exchange here.

8 Let me give you both perhaps the right to close
9 without interruption from me. I say perhaps because sometimes
04:27:34PM 10 I can't control myself, but I think we've covered a lot of the
11 waterfront. We should focus, of course, on why we are here,
12 and that is the motion to remand.

13 So I think, Mr. Stapleton, I'll give you first
14 crack, but, again, in the interest of the shortness of life, I
04:27:53PM 15 think we've covered a lot of this, but if you have some
16 thoughts, arguments that you don't think we've covered enough,
17 you know, I'll give Mr. Schissel as the movant the last word
18 here.

19 **MR. STAPLETON:** Your Honor, I would just say, you
04:28:07PM 20 know, that in 2005 when Congress passed PLCAA, this court and
21 all federal courts necessarily acquired jurisdiction over
22 disputes concerning congressional authority, intent to preempt
23 a subset of traditional state law claims.

24 Regardless of the fact that the underlying causes
04:28:26PM 25 of action may arise under state law, preemption is not an

1 affirmative defense.

2 It is a matter of threshold first instance analysis
3 in which every single one of the plaintiffs' causes of action
4 have to be viewed.

04:28:44PM 5 I think at the risk of being redundant, I'm going
6 to stop there and thank you for hearing me, Your Honor.

7 **THE COURT:** All right, thank you.

8 Mr. Schissel, anything you'd like to say in
9 conclusion?

04:28:54PM 10 **MR. SCHISSEL:** Yes, Your Honor, I'll be brief. Just
11 three or four points I'd like to make, if I may.

12 **THE COURT:** Go ahead.

13 **MR. SCHISSEL:** First of all, going back to this
14 notice of removal, I think it's important, counsel says it
04:29:09PM 15 doesn't mention affirmative defense.

16 It doesn't mention complete preemption. It doesn't
17 mention interstate commerce. And it doesn't mention this
18 state court bias argument, which as I hear -- read their brief
19 and now hear counsel argue, are the three grounds on which
04:29:27PM 20 they are now seeking this court's jurisdiction.

21 And we cited -- and the reason they're doing that,
22 Your Honor, is because we filed a motion for remand that
23 cited -- and I won't go through it all, U.S. Supreme Court
24 case after U.S. Supreme Court case, Western District case that
04:29:46PM 25 debunks the original grounds on which they remove, which was

1 we allege violations of federal law in the context of garden
2 variety tort claims. That does not provide federal
3 jurisdiction.

4 They asserted a federal statute as a defense.
04:30:01PM 5 U.S. Supreme Court cases say that doesn't provide federal
6 jurisdiction.

7 So instead in the context of this motion, not their
8 original removal, they come up with these three new arguments.

9 None of which for the reasons we discussed today
04:30:16PM 10 and for the reasons set forth in our brief have any merit,
11 just like the original two arguments that they made.

12 Now, Your Honor, I would like to pass up, because
13 we did find three additional cases and just for the record,
14 *Lupo vs. Human Affairs International*, 28 F.3d 269,
04:30:35PM 15 Second Circuit 1994; second case is *Webgistix*,
16 W-E-B-G-I-S-T-I-X, a 2013 Western District of New York case;
17 and *Yorkshire-Pioneer Central School District vs. Travelers*, a
18 2002 Western District case, that all say you cannot amend your
19 notice of removal in the context of a motion for remand.

04:31:00PM 20 Your Honor, with respect to complete preemption, I
21 think we've been through that. The statute makes very clear
22 that it is not creating a public or private cause of action.

23 It is explicit. And if it's that explicit, there
24 can never -- it cannot be complete preemption, which by the
04:31:16PM 25 way, Your Honor, the U.S. Supreme Court has found in only

1 three instances.

2 And as Your Honor said, if Congress wanted every
3 case against the gun industry to be brought in federal court,
4 it would have said so.

04:31:31PM 5 Interstate commerce argument, I'll rest on our
6 brief.

7 The state court bias argument, as ludicrous as I
8 think that argument is, Your Honor, even if it were true,
9 which it is not, how does that give rise to federal
04:31:45PM 10 jurisdiction? That's not a ground for federal jurisdiction
11 because the defendant doesn't like the jurisprudence in a
12 state court.

13 Finally, Your Honor, what I would like to conclude
14 with and I'm not going to beat this to death, but just like
04:31:58PM 15 the case in Montana where the same arguments were made, and
16 the Court said, no, that case belongs in state court, the
17 Court found in that case that there was no objectively
18 reasonable basis for removal. And in this case the purported
19 grounds in the notice of removal were directly contrary to
04:32:19PM 20 U.S. Supreme Court precedent.

21 There's no objectively reasonable basis for the
22 three new arguments. I think this presents that rare case
23 where an award of fees and costs associated with this motion
24 are appropriate.

04:32:34PM 25 And with that, Your Honor, unless you have any

1 questions, we rest on our papers and I thank you for your
2 time. And I would just like to hand up these cases and I have
3 copies for counsel as well.

4 **THE COURT:** Well, I'm prepared to rule.

04:32:56PM 5 There is not a great deal of case law in this area.
6 The statute is relatively brief and I've had the benefit of
7 the papers submitted by both sides.

8 I believe that plaintiffs' motion is well-founded
9 and that the case should be remanded to state court.

04:33:23PM 10 I think, as I said, plaintiff has the right to
11 draft their complaint, to choose the forum, and I think the
12 burden is on the party seeking removal to demonstrate that the
13 original forum is improper.

14 Case law so suggests, and I think correctly so,
04:33:49PM 15 that where there's uncertainties, it should be resolved in
16 favor of remand to state court.

17 I think the claims that are advanced here are
18 essentially state law claims, sounding in negligence, failure
19 to exercise due care and so forth.

04:34:09PM 20 And I think it's clear that, although defendants
21 raise the Protection of Lawful Commerce and Arms Act, PLCAA,
22 at 15, U.S.C., Section 7901, et seq., possibility of raising a
23 federal statute as a defense, which I think is what the
24 defendants seek to do here, is not a proper ground for
04:34:36PM 25 removal.

1 I don't believe that this statute provides by its
2 terms subject matter jurisdiction in federal court.

3 I discussed whether this statute really provides a
4 shield against certain claims. It was not my use of the term,
04:35:06PM 5 but Judge Lovell's in the *Woods vs. Stedman's Hardware* case, a
6 District Court of Montana case decided last year 2013,
7 U.S. Dist. Lexis 26261.

8 I think a thorough decision by Judge Lovell, much
9 of which I agree with, in terms of his analysis of PLCAA and
04:35:41PM 10 whether it creates a federal cause of action and whether it
11 does preempt any actions in state court.

12 The statute at 15, U.S.C., Section 7903(5)(c),
13 specifically references that no provision of the act shall be
14 construed to create a cause of action.

04:36:04PM 15 I'm not convinced that that statute is one of those
16 rare circumstances where the Congress has preempted the field
17 and directed matters to proceed only in federal court.

18 I think Congress has done that, although in rare
19 instances, but in my view they have not done so here.

04:36:30PM 20 In other words, I don't believe there is any
21 federal question jurisdiction here.

22 I think the statute that we have talked about does
23 not preclude all actions against manufacturers and dealers in
24 firearms .

04:36:53PM 25 They preclude quite a lot, and I think it's a

1 question for another day as to whether plaintiffs' claims
2 relative to some that might be considered exemptions under
3 Section 7903(5), negligent entrustment, negligence per se, and
4 whether the seller knowingly violated the statute, those are
04:37:16PM 5 not insignificant hurdles.

6 But I think Congress created these exceptions.
7 They could have made -- they could have barred any action
8 against a manufacturer. They chose not to do that. There is
9 a window of opportunity for the plaintiff to attempt to come
04:37:32PM 10 within those exceptions, something we do not decide on a
11 motion to remand.

12 I don't accept the notion that because the state
13 court is what it is, an elected judiciary, that sometimes,
14 somehow that gives federal court a grounds to keep the case in
04:38:02PM 15 federal court. It's not a grounds for removal.

16 I've carefully considered the defendants'
17 alternative grounds and don't find them to warrant the relief
18 that they seek, that is, to keep the case here in federal
19 court under its original removal pleading.

04:38:30PM 20 At the end of the day, I just believe that
21 plaintiffs have the asserted state court claims and that
22 defendants have a defense that they think is strong, but that
23 is not a basis for this Court to allow the removal that was
24 filed that the the grounds that it was filed.

04:38:54PM 25 Based on this ruling, I don't think I need to

1 resolve plaintiffs' argument that the grounds now advanced by
2 defendant were not initially raised in their removal notice
3 and, therefore, should not be considered.

04:39:17PM 4 I've considered the sanction motion. I think it's
5 a close call, but I think it is relatively unusual
6 circumstance when judges award sanctions. Counsel should have
7 some leeway to pursue arguments that might be -- I don't want
8 to say -- well, strong arguments that -- to advance the law.
9 This is a relatively new statute and so I decline to issue
04:39:51PM 10 sanctions in this case, although I understand I have the
11 authority to do so.

12 So I will grant the plaintiffs' motion to remand
13 under 28, U.S.C., Section 1447(c). This constitutes my
14 decision. I may write further on it, but may not. You should
04:40:21PM 15 consider this the Court's decision.

16 I guess, Mr. Schissel, I would ask you to prepare
17 an order, submit it to your opponent as to form within the
18 next week.

19 **MR. SCHISSEL:** Will do, Your Honor, we will do that.

04:40:37PM 20 **THE COURT:** Anything else we can do?

21 **MR. SCHISSEL:** Nothing from me. Thank you, Your
22 Honor.

23 **THE COURT:** Thank you both. Have safe travels back.

24 **MR. SCHISSEL:** Thank you.

04:40:45PM 25 (**WHEREUPON**, the proceedings adjourned at 4:40 p.m.)

* * *

CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Western District of New York before the Honorable David G. Larimer on July 28th, 2014.

S/ Christi A. Macri

Christi A. Macri, FAPR-RMR-CRR-CRI
Official Court Reporter